LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1375

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,

Petitioner,

—v.—

THE M/V MARATHONIAN, her engines, etc., and EUROPA SHIPPING CORPORATION,

Respondents.

BRIEF IN OPPOSITION

KENNETH H. VOLK
Counsel for Respondents
Office and Post Office Address
25 Broadway
New York, New York 10004

BURLINGHAM UNDERWOOD & LORD
MICHAEL C. BYNANE
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,

Petitioner,

—v.—

THE M/V MARATHONIAN, her engines, etc., and EUROPA SHIPPING CORPORATION,

Respondents.

BRIEF IN OPPOSITION

There Is No Basis for Granting the Writ

Petitioner Federal Commerce & Navigation Company, Ltd. asks this Court, in effect, to overrule *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927). In that case, Mr. Justice Holmes, writing for a unanimous court, held that the time charterer of a vessel has no right of action against a tortfeasor who has negligently damaged the chartered vessel.

As a basis for seeking this review, Petitioner incorrectly asserts (2, 13-15) that the decision of the Court of Appeals for the Second Circuit is in conflict with decisions in the Seventh and Ninth Circuits. There is no such conflict. As District Judge Cannella states in his Memorandum Decision (8a-9a):

"Mr. Justice Holmes' decision in *Robins* and the principle of law established therein were followed by the Court of Appeals for this Circuit in the *Agwilines* case, *supra,* and this view has been consistently adhered to by other federal courts. Contrary to plaintiff's assertion, *Robins* correctly reflects the present state of law concerning negligent interference with contract . . . ."

The Seventh Circuit case relied upon by Petitioner, *Chicago and Western Indiana R.R. Co.* v. *The Buko Maru,* 505 F. 2d 579 (7th Cir. 1974) does not even mention *Robins,* nor does it deal with the question of damages at all. The only connection with *Robins* is found buried in an unreported district court decision which is said to have been affirmed *sub silentio,* but in fact was never discussed by the Circuit Court. That unreported decision is annexed to Federal's petition (25a-29a), but even there the District Court was at pains to say that its decision was not inconsistent with *Robins* (28a). There is little wonder, because *The Buko Maru* had absolutely nothing to do with a time chartered vessel; the case dealt with damage to a railroad bridge.

The Ninth Circuit case relied upon by Petitioner, *Carbone* v. *Ursich,* 209 F. 2d 178 (9th Cir. 1953), is even more remote, if that is possible. Again, there was no time chartered vessel involved. The question was simply whether fishermen could recover for fish lost when the fishing net which they were using was negligently damaged by another vessel. The Court held that *Robins* clearly did not apply to that situation saying (pp. 181-2):

"Now a reexamination of what was said in Robins Dry Dock convinces us that the court was there dealing with

> decidedly different principles than those which should attach to the situation of these fishermen. The court was dealing with a state of facts upon which it believed there was no liability whatever.
>
> * * * * *
>
> It is quite evident that the court, although dealing with a well established rule of law of torts, was not thinking of the special situation of the fishermen who, as we have here indicated, had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection. These considerations have given rise to a special right comparable to that of a master to sue for the loss of services of his servant, or the right of a husband or father to sue for the loss of services of wife or child."

Petitioner also cites *Aktieselskabet Cuzco* v. *The Sucaresco,* 294 U.S. 394 (1935), apparently suggesting that this Court has itself questioned *Robins.* But that is not so, as the decision clearly reveals (p. 404). The Court pointed out that cargo owners, just as the fishermen in ~~*The Bubo Maru,*~~ Carbone have an immediate physical nexus with the damaged vessel, giving them a right of recovery. Their interests are distinguished from those of the time charterer who has no such close personal involvement in the enterprise and is therefore denied recovery because of "remoteness." As the Second Circuit said below (23a):

> "We are unable, however, to discern any indication that the Supreme Court has moved away from the *Robins* rule. The only case since *Robins* cited to us, *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394 (1935), explicitly distinguished *Robins,* and the admiralty texts recognize the continued force of the rule."

Finally, Petitioner implies that *Robins* is out of step with the law of England (p. 16), citing *Spartan Steel & Alloys Ltd.* v. *Martin & Co.,* [1972] 3, All E.R. 557 (C.A.). There, negligent damage was done to a cable supplying electrical power to a steel plant, as a consequence of which a "melt" was damaged. The dispute centered on the measure of damages. Plaintiff, owner of the steel plant, claimed not only the damage to the "melt" which was in the furnace at the time of loss of power, but also for the loss of use of the furnace thereafter, until power was restored. The Court denied to plaintiff the loss of use claim and allowed only the consequences of the physical damage. In the course of his opinion (p. 572) Lawton LJ expressly reaffirmed the famous case of *Cattle* v. *Stockton Waterworks Co.,* [1874-80] All E.R. 220, 224, where Blackburn J. said:

> "The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable, or, it may be, a losing contract, in consequence of this injury to Knight's property. We think this does not give him any right of action."

Then Judge Lawton went on to say (p. 572):

> "Earlier in his judgment he [Blackburn J.] had said:
>
> 'No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there

> was none that could have been cited.' There is still no authority directly in point today. Blackburn, J's judgment has been cited with approval and followed many times. . . . For nearly 100 years now contractors and insurers have negotiated policies and premiums have been calculated on the assumption that Blackburn, J's judgment is a correct statement of the law; and those affected financially by the acts of negligent contractors have been advised time and time again that mere financial loss in irrecoverable."

Thus, *Spartan Steel* does not stand for the proposition urged by Petitioner. To the contrary, it stands for just the opposite, and is squarely in accord with *Robins*. Further, the English decisions which deal with time chartered vessels follow exactly the same rule as *Robins*. *Chargeurs Reunis* v. *English & American Shipping Co.*, 9 Ll. L. Rep. 90 (Adm. Div.) aff'd, 9 Ll. L. Rep. 464 (C.A. 1921); *Scrutton on Charterparties and Bills of Lading* 49 (18th Ed. 1974).

Robins Was Correctly Decided

In *Robins* this Court held that a time charterer has no cause of action against the tortfeasor. That is the "Rule" of *Robins*. In an effort to build symmetry into the law, the Rule has sometimes been broadly characterized as denying any recovery for negligent interference with contractual rights. But the Court did not establish any such doctrine. Justice Holmes' exact words were (p. 309):

> "[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."

POOR COPY

This is not the same as saying there can be no recovery for negligent interference with contractual rights. It is this expanded, over-generalized version of the rule which has sometimes been subject to criticism by the commentators.

When we deal with the cut-off point in the cause-and-effect chain of damage resulting from a negligent act, it is tempting to devise rules or catch-phrases which can be applied generally. This subject has long tantalized lawyers, scholars and judges, all seeking some common thread to be universally used to determine the cut-off point. But the goal is elusive and the effort, we submit, futile. Each set of facts must be dealt with independently. Perhaps Judge Andrews came closest to the truth in *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 354-5 (1928) (dissenting opinion):

> "It is all a question of expediency . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

In *Robins* this Court drew the cut-off line so as to exclude the time charterer. This result is practical and fair for at least three reasons.

1. As Petitioner points out, time charter rates fluctuate widely (16). While a tortfeasor may be presumed to have knowledge that many vessels operate under charter today, just as they did in 1927 when *Robins* was decided, he certainly cannot be presumed to know the charter *rate*. It is the *rate* which is of significance, not the fact of the charter itself. If at the time of the collision the rate is lower than the market, the time charterer sustains a loss because he must obtain replacement tonnage at a higher cost. On the

other hand if the rate is higher, then the time charterer gains, because he is temporarily relieved of a burdensome contract and can charter replacement tonnage at a lower cost. Thus, it is a mere fortuity that in this case Petitioner has allegedly sustained an economic loss.

2. If the line is not drawn so as to exclude time charterers what then are the rights of the subcharterer? It is not at all unusual for vessels to operate under an intricate system of charters, including time charters, voyage charters, and space charters. We might for example have a situation where the vessel is under long-term time charter at a higher rate than a short-term sub-time charter. As a result of collision the time charterer might benefit, but the sub-time charterer might sustain an economic loss. These problems, of course, could be multiplied indefinitely.

3. By the very nature of the contract, a time charterer should be excluded. He has no control over the vessel, no say in its management or operation at sea, and bears none of the risks of liability resulting from negligent navigation. He has no physical involvement. All of these factors distinguish him for other interests which have a much closer relationship to the vessel and which are allowed recovery, such as a demise charterer, a cargo owner, a passenger, or a crew member. See footnote 2 of the District Court's opinion (7a).

Mr. Justice Holmes undoubtedly had all of these factors in mind when he wrote the decision in *Robins*, concluding that "[t]he law does not spread its protection so far" (p. 309).

The Complaint Does Not Allege Intentional Tort

Petitioner made the same argument in the Courts below. District Judge Cannella thought so little of it that he ignored it. The Second Circuit curtly dismissed the argument saying (22a):

> "The short answer . . . is that excessive speed in foggy conditions falls short of intentional damage."

The Complaint (2a) alleges that the collision "was caused in whole or in part by fault and negligence of Defendant." There is no mention of intentional wrongdoing, or even of gross negligence. Petitioner siezes upon the words "highly excessive rate of speed in dense fog" to support its argument, but this somewhat redundant phrase, in substance a standard allegation in admiralty pleadings, is nothing more than a specification of the preceding claim of "fault and negligence." If Petitioner had wanted to assert "intentional" or "gross" misconduct, it would have been a simple matter to say so in the complaint. Petitioner's boot-strapping effort to change the meaning of the words at this stage is to no avail.

Conclusion

There is no basis for changing a rule which has been so broadly accepted for such a long time. To do so would require that the entire maritime industry readjust the allocation of risks in very fundamental areas, a result which is contrary to the desired establishment and continuation of stability in the law dealing with commercial matters.

The petition should be denied.

Respectfully submitted,

KENNETH H. VOLK
Counsel for Respondents
Office and Post Office Address
25 Broadway
New York, New York 10004

BURLINGHAM UNDERWOOD & LORD
MICHAEL C. BYNANE
of Counsel

April 20, 1976